United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Affidavit

75-6062

To be argued by
MEL P. BARKAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-6062

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—against—

WILLIAM L. MATHESON, Executor of the Will of Dorothy Gould Burns, Deceased,
Defendant-Appellant.

WILLIAM L. MATHESON, Executor of the Will of Dorothy Gould Burns, Deceased,
Plaintiff-Appellant,

—against—

UNITED STATES OF AMERICA,
Defendant-Appellee.

BRIEF ON BEHALF OF APPELLEE UNITED STATES OF AMERICA

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Preliminary Statement

This appeal involves approximately $3½ million in United States income, gift and estate taxes. If Dorothy Gould Burns was a citizen of the United States or if her executor is estopped from claiming otherwise, the estate remains liable for the taxes. If these questions are resolved in the negative, the estate will not be liable for United States taxes.

William L. Matheson ("Matheson"), Executor of the Estate of Dorothy Gould Burns, appeals from an Order of the Honorable Kevin T. Duffy entered in the United States District Court for the Southern District of New York on May 27, 1975, granting judgment to the United States in two consolidated actions which held that Dorothy Gould Burns was a citizen of the United States and alternatively that her executor is estopped from today claiming that Mrs. Burns was expatriated.

The judgment found Matheson liable for 1966 federal income taxes, interest and costs in the amount of $14,263.24 which was erroneously (without audit) refunded by the Internal Revenue Service to the executor and dismissed Matheson's complaint which sought a refund of gift taxes for the years 1966 through 1968 in the total amount of $9,954.17.

The determination of the citizenship and estoppel questions in this consolidated action controls the outcome of a pending action by Matheson for the redetermination of a $3,228,716.27 federal estate tax deficiency in United States Tax Court. *Estate of Dorothy Gould Burns, deceased, William L. Matheson, Executor* v. *Commissioner of Internal Revenue*, Dkt. No. 8756-73. The Tax Court action has been stayed pending the final decision in this action.

The Opinion Below

Recognizing that all the underlying facts were not materially disputed (A. 27),* the District Court granted the Government's motion for summary judgment and denied Matheson's similar motion. In doing so the Court held that Mrs. Burns, by signing a 1944 application to obtain a certificate of Mexican nationality, did not exhibit the requisite intent to give up her con-

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* References to "A" followed by a page number are to the Joint Appendix.

stitutional right to United States citizenship.* The Court rejected each of the following theories put forward by Matheson: (1) that Mrs. Burns was expatriated as a matter of law when she signed the application because it contained a declaration of allegiance to Mexico; (2) that Mrs. Burns was expatriated because the application was one for "naturalization" under Mexican law; and (3) the application contained an explicit "renunciation of American citizenship".

As to the first theory, the Court held that it was necessary to determine whether Mrs. Burns had the necessary subjective intent to expatriate when she declared allegiance to Mexico. It held that there was considerable evidence that she believed herself to be a dual citizen of the United States by birth and of Mexico automatically by marriage and thus had no intent to expatriate (A. 35-37). The evidence supporting the District Court's decision is set forth in the "Statement of Facts", *infra*.

Regarding the second theory, Judge Duffy's review of Mexican law indicated that Mrs. Burns was already a Mexican national automatically as a matter of Mexican law upon her marriage. Thus, he found that Mrs. Burns' application for a certificate of Mexican nationality was not for "naturalization" but was merely to obtain documentary evidence of her pre-existing status as a Mexican national (A. 38-39).

As to the third theory, the Court held that the 1944 application did not contain an express renunciation of United States citizenship and that Matheson's attempt to construe it as such was a "misinterpretation" of its plain language. The "renunciation" was no more than a restatement of what a dual national could expect concerning rights and protection from one country while present in the other country of nationality (A. 33-35).

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* The opinion will be reported at . . . F. Supp. . . .

Alternatively, the District Court held that Matheson was estopped from taking the position that Mrs. Burns was not a United States citizen since the United States issued passports and a license to her on the basis that she was a U.S. citizen. Their issuance was sufficient detrimental reliance to justify an estoppel (A. 40-42).

Questions Presented

1. Was Mrs. Burns expatriated as a result of signing the application for a certificate of Mexican nationality in 1944?

2. Is the estate of Mrs. Burns estopped from denying that Mrs. Burns was a citizen of the U.S. by:

a) The doctrine of equitable estoppel?

b) The doctrine of administrative collateral estoppel?

c) The doctrine of laches?

3. Was it appropriate to grant summary judgment on the issue of intent in this unique case?

Introduction

The Government's position on expatriation of native-born American citizens since *Afroyim* v. *Rusk*, 387 U.S. 253 (1967), is that any act of expatriation described in 8 U.S.C. § 1481(a) must be accompanied by the requisite intent to expatriate before the constitutional right to citizenship is lost.*

To the extent that a resolution today of the issue of Mrs. Burns' intent to expatriate is difficult to determine,

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* Today's version of 8 U.S.C. § 1481(a) is virtually identical with §§ 401(a) and (b) of the Nationality Act of 1940 set forth in Matheson's Brief at pp. 4-5.

a heavy burden is borne by the party alleging that expatriation was intended. As a matter of law that ultimate burden of persuasion cannot be sustained today by Matheson.

In determining whether Mrs. Burns intended to expatriate in 1944 by applying for a certificate of Mexican nationality Mrs. Burns' testimony is unavailable. However, to the extent that her undisputed acts and written statements before and after 1944 are available, they indicate that she did not intend to give up her U.S. citizenship. Insofar as Matheson's arguments seek to undercut the clear intent and statements in those documents, he contends that Mrs. Burns necessarily lied dozens of times to the State Department, to the Internal Revenue Service, to the Coast Guard, as well as to the French National Sureté and to the French taxing authorities.

Statement of Facts

Background Through August 1944

Dorothy Burns (nee Gould) was born in New York City, a citizen of the United States on March 24, 1904 (E. 2, 3).* She was the daughter of Mr. and Mrs. Frank J. Gould and the granddaughter of Jay Gould, the famous American railroad financier (E. 91). Dorothy Gould resided in the United States until July 1919 (E. 2, 3) when she went to Paris on a United States passport which thereafter lapsed. *Id.* She was married to Baron Roland Graffenreid de Villars, a Swiss citizen, in 1925. By this marriage she automatically obtained Swiss citizenship under Swiss law (A. 118). She then resided in France where she gave birth to two daughters.

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* References to 'E" followed by a page number are to the Exhibit Volume accompanying the Appendix.

In 1934 she entered the United States on a "certificate of identity" (E. 7), and attempted to obtain a United States passport at the New York City office of the Passport Agency. Based upon a concededly erroneous interpretation (E. 81) of the Cable Act of 1922, as amended in 1931, 46 Stat. 1511, she was denied a passport at that time (E. 4-7).*

Dorothy Gould Graffenreid de Villars was divorced from her husband in May 1936 (E. 12). Still operating under the erroneous interpretation of the Cable Act, and for unexplained reasons, the American Consulate General in Paris on October 6, 1936 issued her an "Affidavit in Lieu of Passport". *Id.*** After her divorce, Dorothy Gould apparently lived in French Morocco (A. 120-121; E. 19) and in 1939 or 1940 returned to France, where both her children and her parents resided (A. 122-123).***

In 1940 the Germans invaded France. Dorothy Gould fled to Spain in June 1940 and attempted to enter Portugal on the strength of her "Affidavit in Lieu of Passport" (E. 11-12). Because she lacked a passport, Spanish authorities arrested and briefly confined her in a Spanish jail (E. 103, ¶¶ 15, 16). She apparently was able to free herself by obtaining the aid of the

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* The question of loss of American citizenship by virtue of Mrs. Burns' marriage to a Swiss citizen has not been raised by Matheson in the District Court or on appeal and is not (and cannot be) an issue in this case.

** An affidavit in lieu of passport was a valid travel document.

*** Both of Dorothy Gould's parents, while living in France, remained American citizens until they died (A. 124).

United States government (PP. 8-9). Thus, in Madrid during October 1940, Dorothy Gould applied for a United States passport (E. 10-13). The Department of State granted her application apparently satisfied that it was Mrs. Burns' intent to "return to the United States for permanent residence" (E. 13).

Dorothy Gould, entered the United States in November 1940 and stayed perhaps more than a year. Although this period in her life is hazy, we do know she was in Mexico by September 11, 1942, almost two years after her arrival in America (E. 21).*

On May 24, 1944, Dorothy Gould, then 40, was married to Archibald Burns, 56, a native-born Mexican polo player and industrialist (A. 89, 105). Archibald and Dorothy Gould Burns, immediately made their home in Mexico City. On August 14, 1944, their daughter, Victoria Burns, was born (A. 129).

The Application for a Certificate of Mexican Nationality.

On December 21, 1944, Mrs. Burns applied for a certificate of Mexican nationality. The application stated in pertinent part as follows:

> "I herewith formally declare my allegiance, obedience and submission to the laws and authorities of the Republic of Mexico; I expressly renounce all protection foreign to said laws and authorities and any right which treaties or international law grant to foreigners, expressly fur-

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* Mr. Matheson's June 13, 1973 affidavit states that she *"promptly"* passed through the United States to Cuba in 1940 to 1941 (A. 48). There is no factual support for such an allegation since Matheson first met her in 1952 (A. 119). On the contrary Mrs. Burns stated in a passport application that she "ceased to reside in the United States on or about 1942" (E. 18).

thermore agreeing not to invoke with respect to the Government of the Republic any right inherent in my nationality of origin." *

The certificate of Mexican nationality was issued on January 2, 1945. It stated that Mrs. Burns "acquired the Mexican Nationality *as of the date of her marriage*" and that it was "for legal use which may be convenient to her . . ." (E. 122) (emphasis added).

Matheson, argues that the application constituted an act of expatriation. However, the significance of this document must be examined in the factual and legal context within which it was made. After that review, it will become apparent that the application cannot be considered an act of expatriation.

Mexican Law Concerning the 1944 Application for a Certificate of Mexican Nationality.

Upon her marriage to a Mexican and since she had her domicile in Mexico City, Dorothy Gould Burns *automatically* became a Mexican national by "naturalization" pursuant to Article 30 of the Mexican Political Constitution which read in December 1944 as follows:

> "Mexican nationality is acquired by birth or by naturalization.
>
> (a) Mexicans by birth are:
>
> * * * * *
>
> (b) Mexicans by naturalization are:
>
> I. Foreigners who obtain letters of naturalization from the Secretariat of Relations, and
>
> II. The foreign woman who contracts matrimony with a Mexican and has or establishes her domicile within the national territory." (added 1/18/34.) (E. 125).

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* This was the translation submitted by Mr. Matheson.

The Mexican Nationality and Naturalization Act of 1934 as amended on January 23, 1940, also provided as follows:

> "*Article 2.* The following are Mexicans by naturalization:
>
> I. Aliens who obtain a Naturalization Certificate from the Ministry of Foreign Relations.
>
> II. Any alien woman who marries a Mexican and who has or establishes her domicile within the national territory. She retains her Mexican Nationality even after dissolution of the marriage tie.
>
> The Ministry of Foreign Relations will issue the corresponding declaration in this case." (E. 104).

Mexican law in the 1940's provided that a person could become a Mexican national in four ways: (1) by birth (Article 1); (2) by obtaining a naturalization certificate through lengthy "Ordinary Naturalization" procedures which included petitioning a judge and satisfying minimum language and residence requirements (Articles 7-19 appearing in Chapter II); (3) by obtaining a naturalization certificate through shortened "Privileged Naturalization" procedures which were reserved for classes of people which Mexico courted apparently for predominantly economic reasons (Articles 20-29 appearing in Chapter III); and (4) an alien woman (such as Mrs. Burns) marrying a Mexican who was domiciled in Mexico for which the statute and constitution state absolutely no procedure other than ordering that "[t]he Ministry of Foreign Relations *will* issue the corresponding declaration in this case" (Article 2(II)) (emphasis added) (E. 104-111).*

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* A foreign man marrying a Mexican woman could be naturalized only by the shortened procedures for "Privileged Naturalization" provided in Chapter III of the Mexican law.

The question arose in the early 1940's as to whether Mexican citizenship arising from a woman's marriage to a Mexican national was *automatic* or whether Mexican law *required* a declaration of allegiance and a renunciation of prior citizenship as a prerequisite to the issuance of a certificate of Mexican nationality such as the one signed by Mrs. Burns. This issue was significant because the State Department, citing III Hackworth, *Digest of International Law*, pp. 218-19, took the position that:

> "for loss of nationality to result from taking an oath of allegiance to a foreign state, the oath must be one 'which is prescribed by law' and must be taken before a competent official of the government concerned." (A. 75).

In order to determine what Mexican law required in this regard the State Department made numerous formal and informal inquiries of Mexican officials (A. 70-73). The Mexican government responded (1) "equivocally" or (2) informally "that the procedure in question is arbitrary and that an American woman married to a Mexican is entitled to Mexican citizenship by virtue of the Mexican constitution without submitting to the Foreign Office requirement" or (3) not at all. *Id.*

Finally, in August 1945 the Secretary of State concluded that:

> "the requirement of the Mexican authorities that an American woman who is married to a Mexican make a declaration of allegiance to Mexico *is not one prescribed by law or regulation issued pursuant to law* . . . In the circumstances the Department *will not* consider that any American woman who was married to a Mexican citizen . . . and has made a declaration of allegiance to Mexico thereby

> lost her American citizenship." * *Id.* (emphasis added).

Thus, in 1944 and 1945, the Department of State did not regard a woman such as Mrs. Burns as expatriated. She was in fact regarded as a Mexican national as a matter of law and, thus a dual national. In applying for a certificate of Mexican nationality she was merely obtaining evidence of her pre-existing status as a Mexican national.**

In a diplomatic note to the United States Department of State dated November 1, 1952, the Mexican Ministry of Foreign Affairs stated that Mrs. Burns was issued a certificate of Mexican nationality in accordance with Article 2(II) of the Mexican law and that Mrs. Burns:

> "proved to this Ministry that she contracted marriage . . . on May 24, 1944, *thereby* acquiring Mexican nationality *from the date of her marriage* in accordance with the law cited above" (E. 40) (emphasis added).

Similarly, the certificate of Mexican nationality itself states that "she acquired the Mexican nationality *as of*

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* This conclusion was based on the fact that if there was a requirement for a declaration, the Mexican government would have responded unequivocally with a citation to law or regulation. Their failure to so respond buttressed the informally received Mexican conclusion that there was no such law or regulation. Later events, described *infra* at pp. 12-18, fully support this conclusion.

** As Judge Duffy recognized (A. 33) and as the cases at pages 42-47, *infra*, hold, when dual nationals do a "routine" act such as declaring allegiance to the other country of which they are already a national, it is not considered in derogation of or inimical to their United States citizenship and therefore not expatriating.

the date of her marriage" pursuant to Article 2(II). (E. 115) (emphasis added).

The view that citizenship was obtained automatically upon marriage was obviously shared by all parties. It was Mr. Matheson's view since he previously admitted (A. 48) that "[a]s a matter of Mexican law then in effect, Mme. Burns *upon her marriage* became a Mexican citizen." It was the view of Dorothy Gould Burns' Mexican lawyer, Francisco Liguori, who testified that he informed Mrs. Burns that she was a Mexican national "as a matter of law" because of her marriage and nothing more * (A. 107-108). Similarly in a draft application prepared by Francisco Liquori Mrs. Burns' Mexican nationality is described as having been "acquired automatically by marriage" (E. 119).**

Finally, it was also the view of Dorothy Gould Burns. Thus, Liguori prepared a document signed on April 6, 1946, by Mrs. Burns in which she stated that she "acquired the Mexican nationality by marriage." (E. 120). And on May 18, 1953, she submitted an affidavit to the U.S. Passport Office which stated: "I was given a Mexican passport by the Mexican government because through my marriage to a Mexican citizen I am considered to be a Mexican citizen under Mexican law"

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* "A. Well, it is customary that every foreign woman who marries a Mexican desires to become a Mexican *and as a matter of law she is a Mexican and all the Ministry of Foreign Relations is doing is recognizing that fact*" (A. 107-108) (emphasis added).

** Dorothy Gould Burns apparently signed such an application and submitted it to the Mexican Government (E. 123). The Mexian Government would not permit IRS investigators to copy documents in her Mexican files which related to the years 1943 to 1946 (*Id.*; A. 132-133).

(E. 64). In a similar affidavit dated March 18, 1954, Mrs. Burns stated that "I acquired my Mexican citizenship through marriage to a Mexican in 1944 . . ." (E. 70).* Mrs. Burns continually swore to the Passport Office that she had never been "naturalized" in a foreign state. See, e.g., E. 24, 67, 69.

In December 1949, the Mexican Law of Nationality and Naturalization was substantially altered to eliminate the previous dual nationality problem exemplified by Mrs. Burns' case. A discussion of those changes sheds great light on the applicable law during 1944. A comparison of the Mexican Nationality and Naturalization Law before and after the amendments which were effective January 1, 1950, indicates that Article 2(II) was amended to add the following italicized language:

> Article 2.—The following are Mexicans by naturalization:
>
> * * * * *
>
> II.—An alien woman who marries a Mexican and who has or establishes her domicile within the national territory. *Pursuant to an application by the interested party, in which there are recorded the renunciations and protests to which articles 17 and 18 of this law refer,* the Ministry for Foreign Affairs shall make the corresponding declaration in each case. The alien woman who thus acquires Mexican nationality shall retain the same even after the dissolution of the marital bond. (E. 113).**

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* Even a contemporaneous American commentator on Mexican nationality law wrote that foreign women who married Mexicans and settled in Mexico were Mexican nationals as a matter of law. Koessler, "The Reformed Mexican Nationality Law", 5 LA. L. REV. 420, 423 (1943).

** In 1944 Articles 17 and 18 were declarations required to be made before the Judge in the process of applying for and obtaining ordinary naturalization by aliens who were not so privileged by their marriage under Mexican law as was Dorothy Gould Burns.

[Footnote continued on following page]

In 1949 Oscar Trevino Rios ("Rios") was the Chief of the Legal Section of the Mexican Foreign Office who analyzed and interpreted each one of the changes made in 1949. He prepared a brief for the Mexican Congress on the 1949 law which was "considered to be especially authoritative in view of the fact that the law emanated from the Foreign Office and . . . Rios, as Chief of the Section concerned with its application, undoubtedly had much to do with its preparation." (E. 112).*

With respect to Article 2(II), previously quoted, Rios stated:

> "The second clause of article two [of the old law] *does not require*, as it should, that a foreign woman who contracts marriage with a *Mexican in order to acquire our nationality, renounce expressly her nationality and protest allegiance to our country. In order to introduce this new requirement*, it was necessary to modify . . . clause II *to avoid many conflicts of dual nationality which create problems, difficult of solution, with both domestic and international aspects.*" (E. 115) (emphasis added).

In assessing the inadequacy of Mrs. Burns' "renunciations" in 1944, the italicized additions in 1950 to Article 17, which is referred to in the Amendment to Article 2(II), is of great significance. It is set out below:

> Article 17. The interested party shall submit to the Ministry of Foreign Affairs through the Dis-

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[Footnote continued]
As previously noted, there was nothing in Mexican law during 1944 which required women like Mrs. Burns to make the declarations in Articles 17 and 18.

* According to Francisco Liguori, Rios was the man who processed Mrs. Burns' 1944 application for a certificate of Mexican nationality (A. 97).

> trict Judge an application for his Certificate of Naturalization, *in which he renounces expressly to his nationality of origin as well as to all submission obedience and fidelity to any foreign Government, especially to that of which the applicant may have been a subject* to all protection foreign to the laws and authorities of Mexico and to all rights which may be granted to foreigners under Treaties or international law and protesting in addition, allegiance, obedience and submission to the laws and authorities of the Republic. These renunciations and protests shall be ratified before the Judge, in the cases of ordinary naturalization.* (E. 117) (emphasis added).

Rios recognized that declarations and renunciations such as those written into Mrs. Burns' 1944 application were not complete or clear and fell short of being an effective renunciation of citizenship:

> "*Article 17.—This article of the previous law did not require of the foreigner who became naturalized an express renunciation of his former nationality, but limited itself to the compromise of not permitting him to invoke before the Republic any inherent right of his former nationality.* It was essential to amend this provision to the end that it should clearly exact the express renunciation of nationality of origin which should be made by foreigners in accordance with international right, a renunciation which should be formal, definitive, and without reservations of any kind, to the end that upon naturalizing themselves as Mexicans they may cease to have their former nationality and thus

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* Dorothy Gould Burns did *not*, of course, sign her application "in the presence of . . . [a] Judge." Article 17 appeared both before and after 1950 in the chapter on "Ordinary Naturalization".

> *avoid dual nationalities.* The article should also impose upon the foreigner a complete renunciation forever of all submission, obedience and fidelity to any foreign government, and, very especially, to that of which the applicant may have been a subject." * (E. 116) (emphasis added).

Also, Article 57 of the 1950 Law, which had no antecedents in the earlier law, reinforced the *new* legal requirement that in all cases aliens, including those foreign women who married Mexicans, were required to make the new complete declarations and renunciations before receiving a certificate of Mexican Nationality:

> "Article 57.—For the issuance of certificates of Mexican nationality, it will be necessary for the applicants in each case to make before the Ministry for Foreign Affairs the renunciations and protest referred to in articles 17 and 18 of this law." (E. 114).

Rios said this *addition* was designed to reduce cases of dual nationality:

> "*Article 57.*—It has been observed in many cases that persons who have the nationality of Mexico and another foreign nationality by virtue of the conflict of the national laws, apply for certificates to the effect that they have the quality of Mexicans. *It is considered necessary in this case to give the Ministry of Foreign Relations the power, when dual nationality on the part of the applicant is suspected, to require of him the renunciation of any other foreign nationality he may*

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* Matheson's brief in this Court (p. 8) quotes and emphasizes the "compromise" and "limited" language of the Article 17 renunciations under the law in 1944. As Judge Duffy held it would be a misinterpretation to view such language as an express renunciation of U.S. citizenship.

> *have before issuing to him a Mexican nationality certificate.* In this manner, it will be possible . . . *to reduce the number of cases of dual nationality, which is the tendency of all of the national legislation and of international law in the matter of nationality.*" (E. 18) (emphasis added).

Thus, by these changes Mexico recognized that *before 1950*: (a) the Ministry did not have the "power" to require the protests and renunciations mentioned in the new Articles 17 and 18, (b) foreign women who married Mexicans were treated as dual nationals because of the previously automatic nature of acquiring Mexican nationality pursuant to Article 2(II), and (c) any renunciations were recognized to be ambiguous and insufficient.*

Mrs. Burns by agreeing not to invoke U.S. law and renouncing U.S. protection against Mexico was not giving up anything. Her agreement was consistent with international law as it pertains to dual nationals. As a dual citizen who was residing in Mexico she would not be able to avail herself of or expect American protection there in any

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* In fact the change in law and the nature of the post-1950 renunciations is clearly indicated when one compares Mrs. Burns' statements in the 1944 application with the following clear, complete and effective renunciations required of American women married to Mexicans who applied for certificates after 1950 and who the Department of State deemed as expatriated:

> "*By this device I make express renunciation of my American nationality as well as all submission, obedience and loyalty to whatever foreign Government, especially that of the United States of which I have been a subject* to all protection foreign to the laws and authorities of Mexico and to all rights that treaties or International Law grants to foreigners; protesting moreover, adhesion, obedience and submission to the laws and authorities of the Republic of Mexico." (E. 126) (emphasis added).

The italicized portions are clear and unequivocal and *missing from Mrs. Burns' application.*

event.* The principle was also recognized in Mrs. Burns' own passport file. Thus, after the State Department held Mrs. Burns to be a U.S. citizen in 1953, her U.S. passports were invalid for travel or residence in Mexico (E. 57).

Although in his first affidavit to the District Court Matheson admitted that upon marriage Mrs. Burns became a Mexican national, he argues today that such a theory was unknown to Mexican law and that Mrs. Burns' 1944 application was not merely for a certificate evidencing her previous status as a Mexican national but in fact was an application for "naturalization". Matheson must make this argument in order for him to claim that Mrs. Burns was expatriated pursuant to § 401(a) of the Nationality Act of 1940.

Matheson's recent and convenient re-interpretation of Mexican law (Br. 22-26) is based upon a February 28, 1974 opinion by the Legal Department of the Mexican Foreign Ministry (A. 61-69). The opinion's touchstone is that Mexico was pledged by a 1936 international convention, to which the United States was not a party, to reduce instances of dual nationality wherever possible. It concludes that renunciation was always required and that foreign women marrying Mexican men and who resided in Mexico were not automatically Mexicans as a matter of law but first were required to apply for a certificate. This tortured opinion is contrary to everyone's contemporaneous under-

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* The Supreme Court in *Kawakita* v. *United States*, 345 U.S. 717, 733 (1952) stated:

> "'He [a dual national] is not entitled to protection by one of the two states of which he is a national while in the territorial jurisdiction of the other.'"

See also, *Nishikawa* v. *Dulles*, 356 U.S. 129, 132 (1958) where it was recognized that the United States does not aid dual nationals in the other country of nationality.

standing of Mexican law—including Mexico's. It ignores the fact that Rios, then head of the Legal Department in the Foreign Ministry in the 1940's gave precisely the contrary opinion when he reported to the Mexican Congress on the 1950 amendments.* It ignores all of the official Mexican documents relating to Mrs. Burns which emanated from the Mexican government. It ignores the language of the certificate of Mexican nationality issued to Mrs. Burns as well as the contents of Mexico's diplomatic note to the State Department of November 1, 1952, regarding Mrs. Burns' case. *Supra*, p. 11. It is notable that the Mexican government had been requested to furnish such information concerning Mexican law 30 years ago and had never done so. *Supra*, pp. 10-11.

In evaluating the 1974 Mexican opinion it should be noted that it was the third opinion on the subject rendered by the Foreign Ministry in the past three years. The first opinion was admittedly wrong and the second was equivocal at best. Both earlier opinions were issued at the request of Rolande, Mrs. Burns' eldest daughter who is now a Mexican national residing in Mexico City and a major residuary beneficiary under her mother's will. On July 5, 1971, Rolande requested "the opinion of the Legal Department about the validity, according to the Mexican laws, of the renunciation of North American Nationality made by my Mother . . ." (E. 199). On July 14 the Foreign Office responded in an opinion (E. 200) that Rolande and her counsel recognized as erroneous on its face since it expressly applied the wrong law. Because of this Rolande requested a second opinion in a letter dated

* It is perfectly apparent that Mexico took 14 years before it implemented the international convention which sought to reduce instances of dual nationality. This was clearly recognized by Rios as the primary purpose of the 1950 amendments.

January 12, 1972 (E. 202-203). On February 18, 1972, the Foreign Ministry replied with its second opinion (E. 204-205). It was as unilluminating as the first. As to what Mexico *required* in 1944, the second opinion also appears to speak in the present tense rather than of the law in 1944. Therefore the second opinion erroneously purports to characterize Mrs. Burns' 1944 application as containing an "express" renunciation "of her American citizenship". That opinion again failed to state unambiguously and unequivocally that the declaration of allegiance and the "renunciation" in Mrs. Burns' 1944 application were requirements of Mexican law. This continuing lack of clarity and ambiguity was recognized by both Passport Office and Internal Revenue Service personnel who were reviewing Matheson's recent claim of Mrs. Burns' alleged expatriation (E. 85, 87). Thus, the most recent Foreign Ministry opinion on which Matheson now relies for his changed view of Mexican law, was one that the Ministry had almost three years' practice to perfect. It should also be remembered that the Mexican government did not permit the United States any meaningful access to their records concerning Mrs. Burns' activities in the 1940's although there were such records in existence (A. 132-33; E. 123). The selectivity exercised by Mexico in providing information to a United States court at the very least should be considered in evaluating the validity of that opinion.*

Under all of these circumstances the District Court's reliance upon the contemporaneous evidence of Mexican law was clearly correct:

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* The Mexican opinion of 1974 gives three supposed examples of Americans who became "naturalized" Mexicans in the 1940's about whom the Mexicans communicated with the State Department (A. 66-67). However, none of these three were ever regarded by the State Department as having been expatriated by virtue of their applications in the 1940's. (E. 99, ¶ 47, 100, ¶¶ 48 and 49, 206-209).

"The weight of the proof indicates that Mrs. Burns acquired Mexican citizenship upon marriage and that application for and issuance of the certificate constituted an additional formality executed for, as the certificate itself states, 'legal use which may be convenient'." * (A. 39).

Facts concerning Mrs. Burns' 1944 application

Above we have set forth all of the facts concerning the unanimous contemporaneous view of Mexican law in the 1940's which was shared by Mrs. Burns. The following are the facts surrounding the 1944 application by Mrs. Burns for a certificate of Mexican Nationality.

A few months after Archibald and Dorothy Burns were married, Francisco Liguori, a young assistant lawyer, was summoned by Archibald Burns to the Burns' home in Mexico City and informed that "they wanted to obtain a certificate of Mexican nationality for Mrs. Burns." (A. 92). In December 1944 Francisco Liguori prepared and Mrs. Burns signed a request from the local police precinct for a certificate of domicile in Mexico City (A. 94).

On December 21, 1944, Liguori went to the Burns' home with a document "request[ing] from the Ministry of Foreign Relations that a certificate of Mexican nationality be issued in her [Mrs. Burns'] favor, having as a basis for

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* While matters of foreign law were and still are considered by some courts to be factual issues, the addition in 1966 of Rule 44.1 to the Federal Rules of Civil Procedure treats them as matters of law for the court which may consider "any relevant material or source" regardless of admissibility. Questions of foreign law are appropriately decided on a motion for summary judgment. See *Instituto Per Lo Sviluppo Economico, etc.* v. *Sperti Product, Inc.*, 323 F. Supp. 630, 635 (S.D.N.Y. 1971) (Mansfield, *J.*).

her request that she has a residence in the national territory and that she married a Mexican." (A. 95). This document forms the entire basis for today's claim by Mr. Matheson that Mrs. Burns was expatriated. The translation provided by Mr. Matheson, reads as follows:

> "To the Secretary of Foreign Affairs Legal Department
>
> I, Dorothy Gould Burns, of U.S. nationality married, with domicile . . . in this city, respectfully appear and declare:
>
> That I request that you issue to me a certificate of Mexican nationality, in view of the fact that I have my residence in the territory of the nation, as proven by the enclosed certificate, and that I contracted marriage on May 24th of the present year, as proven by the corresponding certificate, to Mr. Archibald [. . .] Burns, of Mexican nationality, in accordance with the birth certificate which I also submit herewith.
>
> I herewith formally declare my allegiance, obedience and submission to the laws and authorities of the Republic of Mexico; I expressly renounce all protection foreign to said laws and authorities and any right which treaties or international law grant to foreigners, expressly furthermore agreeing not to invoke with respect to the Government of the Republic any right inherent in my nationality of origin.
>
> Under oath, I declare that I have no title of nobility to waive, but assuming that, without my knowledge, I should have any such right, I herewith formally waive same whatever its origin.
>
> * * * * *
>
> In view of the foregoing and pursuant to Subdivision II, of Article 2 of the Nationality and Naturalization Law, I respectfully pray that the Department of Foreign Affairs:

I. Admit the present request as written, in which I request the issuance of a certificate of Mexican nationality.

II. Hold that the affirmations and waivers referred to in Articles 17 and 18 of the Nationality and Naturalization Law in force have been duly submitted.

* * * * *

V. In due time, issue to me the certificate requested.

Respectfully submitted,

Mexico, D.F. December 21, 1944
S/ Dorothy Gould Burns"

In spite of Matheson's contention (Br. 8), Francisco Liguori's testimony sheds little or no additional light on the matter of Mrs. Burns' intent to renounce her U. S. citizenship. Prompted by a series of objectionable leading questions on direct examination, Francisco Liguori testified in a rather incomprehensible manner as follows:

"Q. At the time Mrs. Burns signed Deposition Defendant's Exhibit 2A,* did you or did you not explain to her in substance that by signing this document she would be pledging allegiance to the Republic of Mexico?

Mr. Barkan: I object to the question as leading.

Mr. Owen: He's noted his objection.

A. Yes, I explained it to her.

Q. At the time Mrs. Burns signed Deposition Defendant's Exhibit 2, did you or did you not explain to Mrs. Burns in substance that by signing the document she renounced her allegiance and any pro-

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* Exhibits 2A and 2 are both copies of the 1944 application. Exhibit 2A is a photocopy of the original filed with the Mexican government and Exhibit 2 was Liguori's file copy.

tections from governments other than the Republic of Mexico?

Mr. Barkan: I object again to the question as leading.

Interpreter: I'm sorry sir, would you repeat the last part of the question.

Q. Did you or did you not explain to Mrs. Burns in substance that she by signing this document—Ah, her allegiance to or protections from governments other than the Republic of Mexico?

Mr. Barkan: I object again as leading.

A. Yes, I even read it to her and I explained to her the second paragraph and this other. Because she said that she had been married to a Count. Therefore, I explained to her this paragraph and this other, the two paragraphs, that is to say, "Pursuant to this writing I hereby formally protest my adhesion, obedience and submission to the laws and authorities of the Mexican Republic."

Q. Let me interrupt. Just for purposes of the record the witness is referring to Deposition Defendant's Exhibit "2", the third full paragraph of the first page, is that correct?

A. Yes, as well as this other paragraph.

Q. Which is the fourth full paragraph of the first page?

A. Yes" (A. 98-99).

Although the above testimony should be stricken as improper in form, it makes little difference as the testimony makes no sense. The full testimony, if capable of analysis, does not aid Matheson one iota. When asked to "explain what the third full paragraph means" (A. 100),

Liguori did *not* say that it meant that "she renounced her allegiance" to the United States. All Liguori did was to virtually read the equivocal "renunciations" to Mrs. Burns (A. 95, 100).* As Judge Duffy held, the document should, in any event, speak for itself (A. 37-38).

On two occasions Francisco Liguori testified (in a conclusory fashion which was unresponsive to the questions asked) that Mrs. Burns signed the application because she wanted to obtain Mexican nationality and reside in Mexico (A. 101, 108-109). Matheson cites this testimony for the proposition that Mrs. Burns' application was for "naturalization" (Brief pp. 8, 15) rather than for merely a certificate evidencing Mrs. Burns' pre-existing status as a Mexican national. However, this is contrary to Liguori's specific testimony on the subject (see p. 12, *supra*). Also, it sheds no light on Mrs. Burns' intent since there is no doubt that Mrs. Burns wanted evidence of her Mexican nationality for two very specific reasons: (1) to aid in the immigration of her daughter, Rolande, and (2) to make permanent residence and travel in and out of Mexico convenient as a result intricate Mexican travel restrictions. *Infra*, pp. 29-30).

The application which Mrs. Burns signed in 1944 was in Spanish. Francisco Liguori testified that he read the document aloud to her in Spanish (A. 92). There is no evidence that the document was ever translated into English or French—languages which Mrs. Burns spoke. (E. 103 ¶17). Although Judge Duffy accepted

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* When Liguori was asked over objection to "explain what the third full paragraph means" he answered:

> "A. That she adheres and submits and will obey the laws and authorities of the Mexican Republic, therefore waiving expressly to all foreign protection to said laws and authorities, committing herself not to invoke before the Government of the Mexican Republic no inherent rights of her nationality of origin." (A. 100).

It is not likely that he explained it any more coherently to Mrs. Burns 30 years before.

Matheson's "insistence" that Mrs. Burns was fluent in Spanish (A. 37), Mrs. Burns' knowledge of the Spanish language during 1944 is questionable. To be sure, she lived in Spanish-speaking countries for three years (E. 11, 18), but her husband was English speaking (A. 106), almost all her friends were American, British and European (A. 105, 131), and her wedding was attended by almost all Americans. *Id.*

The Liguoris testified as to Mrs. Burns' proficiency in Spanish, which was the only language spoken by Francisco Liguori to Dorothy Gould Burns on December 21, 1944 (A. 92). Jose Liguori testified that she understood "roughly 70%" of what was said to her in a social context (A. 113). Francisco Liguori testified that Mrs. Burns' accent was bad, but she "understood . . . and made herself understood" in Spanish (A. 92, 106).

Francisco Liguori's credibility is subject to question. First, he would be professionally embarrassed by any suggestion that he proffered to his client a document which she was incapable of understanding. Second, he was attempting to recall events of thirty years ago. Furthermore, regardless of how fluent Mrs. Burns might have been in conversational Spanish, the document and subject matter in question was technical and legal in nature. To understand it would require more than a passing knowledge of conversational Spanish.

Supporting the view that she did not understand what she had signed are Mrs. Burns' repeated statements under oath that she never made a declaration of allegiance to a foreign state. The first time she needed an American passport was in 1947. On May 2, 1947, when applying for that passport (which was issued three weeks later) she swore in an "Affidavit By Native American to Explain Protracted Foreign Residence" that she had "never . . . taken an oath or made an affirmation or other formal declaration of allegiance to a foreign state . . ." (E. 18). She signed similar sworn statements on fourteen other occasions: twice on March 30, 1951 (E. 22, 24); May 6

1952 (E. 29); January 26, 1953 (E. 35); March 30, 1953 (E. 31); May 18, 1953 (E. 65); March 18, 1954 (E. 69); February 23, 1955 (E. 67); April 29, 1957 (E. 73); March 16, 1959 (E. 71); January 24, 1961 (E. 74); March 27, 1963 (E. 76); December 8, 1965 (E. 77); and February 28, 1968 (E. 79). Thus, in fifteen separate affidavits she swore that she did not execute such a formal declaration of allegiance.*

Matheson, in his motion for summary judgment, cruelly regarded his deceased client as a liar and, indeed, a criminal. First, he argues that she lied under oath when she denied ever taking a "declaration" of allegiance.** Second, she also lied by continually swearing, under penalty of perjury, that she was a United States citizen to the State Department (E. 15, 19, 22, 24, 31, 67, 71, 74, 75, 77, 78), to the IRS (E. 150-170) and to the Coast Guard (E. 184) as well as to French Government authorities (E. 171-180, 189-193). Matheson's "reason" as to why Mrs. Burns turned liar and criminal in 1947 is surprising, incredible and hearsay. Matheson asserts that she misrepresented her U.S. citizenship to the State Department because prior to her becoming a wealthy woman in 1956 "she had very little funds of her own and was forced to travel on planes and boats in

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* In her application of May 2, 1947, for a United States passport, she stated to the contrary (E. 19) This, it seems, merely adds to the confusion about what she understood of the 1944 application.

** The declaration of allegiance was translated from the Spanish "protesta" in the 1944 application by the interpreter at the Liguori's depositions as "*protest* of adhesion" (A. 98-99). The translation was stipulated as accurate (A. 114). Similarly, the translations of the 1950 amendments to the Mexican law and Rios' commentaries use the word "protest". *Supra* pp. 13-16. The *fourth* definition for the word "protest" in the American Heritage Dictionary of the English Language (1973 ed.) is: to proclaim or made known. *That definition is described as archaic.* Thus Mrs. Burns would have to have had an extraordinary knowledge of both Spanish and English to understand that the word "protesta" means to "proclaim" or to "declare." Even the Mexican interpreter at the depositions did not realize the subtleties of the translation.

tourist class rather than first class . . ." Thus, it was Matheson's "understanding" that before 1956 Mrs. Burns applied for a United States passport and wanted to keep it because, "when she travelled on her Mexican passport in tourist class, she was extremely dissatisfied with the treatment she received from airlines and shipping companies, and she felt that she would be accorded better treatment in tourist class if she carried a United States passport." (A. 134). This position is surprising because Matheson himself apparently always regarded Mrs. Burns as an American citizen in documents filed with the government. In addition to other documents, Matheson prepared twenty-one tax returns for Mrs. Burns under penalty of perjury in which they stated that Mrs. Burns' citizenship was "U.S.A." (E. 150-170). This was so, Matheson admitted on his deposition (A. 125-126), despite the fact that as early as 1953 "I thought she [Mrs. Burns] probably wasn't [a U.S. citizen]" for most of the same reasons which have been put forward in this action. Matheson kept his doubts to himself because he "did not want to rock the boat" and thereby "jeopardize her obtaining a passport as soon as possible." *Id.*

Mr. Matheson's explanation as to why Mrs. Burns lied is unsatisfactory for several reasons in addition to its inherent incredibility and inadmissibility. His explanation of the reason why she allegedly lied in her passport applications before 1956 (i.e., she couldn't afford to travel first class), does not account for why she allegedly lied after 1956, the year of a substantial inheritance, after which she could well afford to travel first class. Second, why would a woman with Mrs. Burns' background—whose "good faith could not be questioned" by the French taxing authorities (E. 121)—commit dozens of crimes by lying to the State Department and then to the Internal Revenue Service in returns filed after 1956? It also does not seem reasonable that in order to obtain better traveling accommodations she would intentionally cause Mr. Matheson, her friend, confidante, legal and business advisor as well

as her executor, to misrepresent the fact of her citizenship in her tax returns—which he prepared—as well as in a sworn affidavit to the French government. There is not one iota of admissible or credible evidence that Mrs. Burns lied to the U.S. and French governments when she swore that she was a U.S. citizen. If she did so, she and her executor are now estopped (Points II and III, *infra*). If not, the law is clear that she cannot expatriate contrary to her intent (Point I, *infra*).

Returning to events in 1944, what were Mrs. Burns' reasons in signing the application for a certificate of Mexican nationality? Judge Duffy's finding that Mrs. Burns wanted the Mexican Certificate for reasons of convenience is supported by the record and is apparently uncontested by Matheson. First, she wanted to obtain the immigration to Mexico of her daughter, Rolande, as a preferred immigrant with a parent who was a Mexican national (A. 104, 109). To do this she needed proof of her previously acquired Mexican nationality. Second, she needed a Mexican passport to live in Mexico with her husband on any permanent basis; otherwise she might have to leave Mexico every 90 days or six months (E. 57-59, 143, 145). She was forced by "intricate Mexican travel restrictions" (E. 141) to use a Mexican passport to enter and leave the country of which she was also a national (E. 58-59, 64, 70).

The Consular Officer of the State Department noted in 1953 that she obtained the Certificate of Mexican nationality for the following reasons:

> "[I]t was the least difficult means available permitting her to remain indefinitely in Mexico. It is now necessary for her to use a valid Mexican passport when entering or leaving Mexico. Since Mrs. Burns at all times holds herself out to be American and uses the Mexican passport only when entering or leaving Mexico, it is not believed that the use of the passport indicates a lack of loyalty to the United States." (E. 61).

As we will show in Point I, the law is clear that where dual nationals such as Mrs. Burns, do a "routine" act, such as declaring allegiance to the other country of which they are already a national, in order to obtain a passport or for the purpose of making life in that other country of nationality more "convenient", such acts are not expatriating but merely descriptive of one aspect of the dual national's status.

It is inconceivable that Dorothy Burns would give up her U.S. citizenship in 1944 when the United States Government did not view her acts as expatriating. This is certainly true in her case where just four years earlier the American Consulate provided her with papers which seemingly enabled her to be freed from a Spanish jail (*supra*, pp. 6-7). Given the choice as to whether to retain her U.S. citizenship in 1944, we submit that there is no doubt that she would opt to retain it. As the Supreme Court said in 1943:

> "[I]t is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance." *Schneiderman* v. *United States*, 320 U.S. 118, 122 (1943).

The Formal Determination by the State Department that Mrs. Burns was a Citizen of the United States.

On April 7, 1949, Mrs. Burns applied for and was granted a two year renewal of her U.S. passport after swearing that she was a United States citizen (E. 15). On March 30, 1951 Mrs. Burns again applied for a U.S. passport, again swearing that she was a U.S. citizen (E. 22). In that application she stated that she "usually take[s] one trip to the United States every year . . ."

and that she maintained ties with the United States through her family (aunt, uncle and many cousins) and through her father's business and estate (E. 24). The American Consul extended her passport for six months and requested instructions from the State Department in Washington as to whether two-year extensions were proper, stating however:

> "I have no reason to believe that Mrs. Burns has lost her American citizenship under any of the provisions of the Nationality Act of 1940. . . ." (E. 25).*

Apparently, the State Department did nothing regarding the American Consul's request by August 28, 1951, when Mrs. Burns, again swearing that she was a U.S. citizen, applied for an extension of her U.S. passport at the American Consulate in Nice, France (E. 26). The American Consul renewed it for another six months. *Id.*

On May 6, 1952, Mrs. Burns applied at the American Consul in Mexico City to extend her passport for four months so that she could travel to Europe (E. 28-29). This application was referred to the State Department for consideration and decision (E. 28). On August 18, 1952, the Department of State authorized the Officer in Charge of the American Mission, Mexico City to renew Mrs. Burns' United States passport:

> "provided you are satisfied that Mrs. Burns acquired Mexican Citizenship solely through her marriage to a naturalized Mexican citizen, and that the acquisition of Mexican nationality was not effected by the performance of any act on her part." (E. 30).

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* The reason for the 6-month as distinguished from the 2-year extension was the policy of the Passport Office to give shorter extensions to Americans residing abroad (E. 127-128).

Obviously satisfied that the above proviso was met, the American Mission granted the renewal (E. 34). On March 30, 1953, Mrs. Burns again applied to the U.S. Consulate for a renewal. (E. 33). In that application Mrs. Burns again swore that she was a "native American citizen." *Id.* Her application again was referred to the Department of State for consideration and decision (E. 32).

In the meantime, the State Department had undertaken an investigation of the question of Mrs. Burns' citizenship and specifically the question of whether she was expatriated upon becoming a Mexican national. The State Department sent a diplomatic note to the Mexican Ministry of Foreign Relations on October 24, 1952, inquiring about the "nationality status of Mrs. Dorothy Gould Burns" (E. 42). The Mexican Ministry of Foreign Relations replied on November 1, 1952, that Mrs. Burns was issued a certificate of Mexican nationality after she "proved . . . that she contracted marriage with Mr. Archibald[. . .] Burns Moreno on May 24, 1944, *thereby* acquiring Mexican nationality from the date of her marriage . . ." * (E. 40) (emphasis added).

During this period Mrs. Burns consulted Matheson with respect to her problems in renewing her United States passport. On December 11, 1952, he wrote to Mrs. Burns, informing her of the Passport Office six-month renewal policy in which he stated:

> The law governing the issuance of United States passports provides that they are to be issued to those persons owing allegiance to the United States, which, of course, includes you (E. 127-128).

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* Any question concerning the status of Archibald Burns as a Mexican citizen was resolved on April 17, 1946, when the Foreign Ministry issued a certificate that he was a native-born Mexican (E. 36-37).

In late December 1952 and January 1953, Mrs. Burns corresponded with Matheson about some difficulties she had encountered with the airlines in travelling between Mexico and New York due to the fact that she possessed two passports (E. 129-131). In one such letter, Mrs. Burns asked Matheson about the tax consequences of her citizenship.* (E. 132).

In the middle of February 1953, Mr. Matheson called W. H. Young, of the Department of State. On February 17, 1953, Mr. Matheson memorialized that conversation in a letter to Mrs. Burns:

> "I inquired whether your United States passport was to be issued forthwith. He informed me that the Department was now considering the question of whether you have lost your United States Citizenship. He did not give me any indication of what the answer was to be. The indecision stems from your two marriages abroad, your long residence abroad, and principally, the fact that you obtained a Mexican Nationality Certificate.** It is my impression that you will be held to have remained an American citizen and, if so, your passport will be renewed . . .
>
> Mr. Young informed me that the decision will be made concerning your citizenship within the next two weeks so perhaps you had better not re-

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* The query concerning estate taxes undoubtedly stemmed from the fact that Mrs. Burns' mother had recently died and that there were distribution proceedings then taking place in New York. (E. 146-149).

** It is remarkable that Matheson never received from his client a copy of the application for the certificate when he became aware of the certificate in 1953. In this action he claims that he was not aware of the application until it was discovered after Mrs. Burns died.

> nounce your Mexican citizenship prior to that time. Eventually, however, I feel certain you will have to surrender your Mexican passport.
>
> If the results of the Department's deliberations are not satisfactory, we shall probably have to go to Washington and settle them once and for all some time this spring." (E. 133).

Both Matheson and Mrs. Burns were aware that the Department of State would not renew Mrs. Burns' passport if she was held not to be an American citizen by reason of her "obtaining a Mexican Nationality Certificate".

Mrs. Burns in early 1953 twice requested Mr. Matheson to check with Washington. She exhibited impatience with the slowness of the State Department's citizenship determination in her correspondence with Matheson. (E. 135-139, 144-145). Finally, Matheson wrote to the Statement Department on March 13, 1953, requesting advice as to "what power of attorney, if any, from Mrs. Burns would be necessary for me to represent her before the Department" (E. 45-46).

On March 23, 1953, Matheson spoke with Mr. Curry of the Passport Division of the State Department. Mr. Curry made a memorandum of that conversation which states in pertinent part:

> ". . . I explained to Mr. Matheson why the Mexican Government considers Mrs. Burns a Mexican national by marriage, but that she had not by this reason become expatriated.
>
> * * * * *
>
> I told him that the fact was that she didn't need an American passport for residence in Mexico and that *since she possessed dual nationality* and had

> resided abroad for most of her life I doubted very much if she could have a passport for residence in Mexico, that the proper document of this type of case would be for her to have a card or certificate of registration for residence in Mexico . . . as an American citizen." (E. 47-48) (emphasis added).

Mr. Matheson, obviously pleased with the conversation, the next day wrote to Mrs. Burns, in pertinent part, as follows:

> "Mr. John Curry of the State Department, *the adjudicator* in charge of your case, informs me as follows:
>
> (1) *They have concluded you remain a citizen of the United States.*
>
> * * * * *
>
> *Now, first the decision that you are a United States citizen is favorable and we do not wish you to do anything to disturb it. This is true not so much from a United States tax standpoint as from the standpoint of the rights and privileges you will enjoy at the time of your father's death. It may help you to avoid any Mexican inheritance taxes then also. It may be that after his estate is settled we shall recommend that you renounce your United States citizenship if you are to continue living abroad in order to avoid any gift tax in creating a trust, but this is in the distant future and not a problem now.* . . However, we do not want you to lose your [American] citizenship*

*The rights and privileges of U.S. citizenship which Mr. Matheson referred to involved posting bonds, litigation, qualifying as an executrix under her father's will, and being appointed a guardian of her children if they were to receive any interest in the Estate of Frank Jay Gould (Matheson Deposition, R. 28, pp. 81-82).

> *in making your departure [from Mexico] and suggest you do as follows:*
>
> * * * * *
>
> *Let me emphasize again, do not do anything in choosing that will put your United States citizenship in jeopardy."* (E. 140-141) (emphasis added).

On March 31, 1953, the Director of the Department of State's Passport Office, wrote to Mr. Matheson informing him that Mrs. Burns' passport was extended; that the State Department regarded Mrs. Burns as a dual national; that Mrs. Burns, as a dual national residing in Mexico, was not entitled to unlimited use of her U.S. Passport in Mexico; and that Mrs. Burns should register and obtain a certificate of identity from the U.S. Consulate in Mexico City to alleviate her difficulties with the air lines (E. 58-59).

On April 2, 1953, Mr. Matheson forwarded that letter to Mrs. Burns (E. 142) and wrote on the same day to the Passport Office as follows:

> "I have your letter on March 31st concerning the above reference. Although you did not expressly state that you have determined that Mrs. Burns remains a United States citizen, I infer that to be true . . . [The American Consul] has not been informed as to your decision regarding Mrs. Burns' retention of her United States citizenship.
>
> "When the consul in Mexico City is duly notified of your *adjudication* concerning Mrs. Burns' citizenship, she will be able to obtain her card of identity." (E. 50-51) (emphasis added).

On April 10, 1953, the State Department telegraphed instructions to the Consulate in Mexico City to renew Mrs. Burns' passport (E. 54). The next day Mrs. Burns

wrote to Matheson: ". . . I am pleased to know that I haven't lost my citizenship." (E. 143).

On May 7, 1953, the State Department formally concluded that Mrs. Burns did not lose her American citizenship by reason of her acquisition of Mexican nationality:

> "In view of the information furnished by the Mexican Ministry for Foreign Relations explaining why Mrs. Burns is considered to possess Mexican nationality, the Department is satisfied that she did not lose American citizenship by reason of her acquisition of Mexican nationality which appears to have been acquired merely by operation of Mexican law." (E. 61-62).

Mrs. Burns' Acts and Statements After the Favorable Citizenship Determination Show that She Did not Wish to "Jeopardize" Her American Citizenship.

Every action that Mrs. Burns performed after 1953 was consistent with Matheson's emphatic instruction to her: "do not do anything . . . that will put your United States citizenship in jeopardy."

Thus, from at least 1956 through her death, Mrs. Burns paid a total of $102,006.19 in U. S. income taxes as a U. S. citizen. In 1959 and for each year thereafter until she died, Mrs. Burns claimed a tax credit for French taxes paid on her U. S. tax returns. They were completed under penalty of perjury by Matheson and included a statement on the forms for the foreign tax credit which were completed by hand stating "CITIZEN OF (Name of Country)—U.S.A." (E. 150-159).

From at least 1956 through her death Mrs. Burns paid a total of $116,964.80 in U.S. gift taxes. In 1957 alone Mrs. Burns paid $62,392.27 in U.S. gift taxes. On each gift tax return (each was prepared by Mr.

Matheson) there was a space marked "CITIZENSHIP" and typed in or written in each year, under penalty of perjury, was "U.S.A." (E. 160-170).*

Thus, Mrs. Burns paid a total of $218,970.99 in U. S. income and gift taxes as an American citizen from 1956 until her death. One can hardly imagine that she would do so if she could avoid it, since she certainly exhibited no great inclination to pay U.S. taxes. (E. 171). In fact, Matheson wrote to her in 1953 that she might one day "in the distant future" want to renounce her American citizenship to avoid the payment of gift taxes. (E. 140).**

In 1953, Mrs. Burns left her husband in Mexico and moved to France. Mrs. Burns' position taken with the French taxing and police authorities provides additional proof that she always considered herself an American citizen. Indeed, she obtained substantial benefit from that position. Most of Mrs. Burns' assets and income ($175,867.39 in 1966) arose from U.S. "tax free" municipal securities (E. 173-174). In 1968, the French taxing authorities questioned Mrs. Burns as to why she did not pay French taxes on her entire income for the year 1966. French tax laws provided that Mrs. Burns could exclude for French taxing purposes any income reported for tax purposes to the country of her origin. General Code of Taxes, Art. 164-1. (E. 172). Mrs. Burns quite properly asserted that as an American citizen she was entitled to exclude her U.S. income. Thus, in a memo to the French authorities dated May 6, 1968, she stated:

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* Before the pre-1966 tax returns were in fact produced by Matheson pursuant to Judge Duffy's order, Matheson attempted to excuse the damaging effect of Mrs. Burns' payments as a U.S. citizen "because her gifts were small" (A. 50, ¶ 12). The gifts totalled more than $500,000.

** This she could not do after March 8, 1965, with any appreciable tax saving. 26 U.S.C. § 2107 prohibited obtaining tax avoidance by expatriation.

> "Being an American national . . . and domiciled in France this Article 164-1 seems to me applicable." *Id.**

Matheson took the identical position and in an affidavit to the French authorities dated February 12, 1969, stated:

> "2. I am the attorney for and am familiar with all the business affairs of Mrs. Dorothy Jay Gould (also known as Mrs. Dorothy Gould Burns) in the United States and have been so during the last 17 years.
>
> I am also familiar with all the facts and circumstances hereinafter stated.
>
> 3. All of the income derived from securities and activities owned or maintained by Mrs. Dorothy Jay Gould in the United States is subject to the income taxes levied by the Government of the United States of America *because she is a subject of the United States of America.*" (E. 173-174). (emphasis added).

The above problem concerning French taxes (in which Mrs. Burns apparently prevailed) involved the year 1966. It should be noted that the case before this Court on appeal, 73 Civ. 2011, involves a claim for a refund of 1966 United States income taxes on the ground that Mrs. Burns was not an American citizen in 1966.

Mrs. Burns' declarations consistent with her U.S. citizenship were not limited to her tax returns. In 1952, Mrs. Burns caused an "Act of Notoriety" to be executed under French law for filing ancillary papers in the New York probate proceedings following the death of her mother. It was declared therein that Mrs. Burns "is a citizen of

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* Mr. Matheson also produced three French income tax returns in which Mrs. Burns declared herself to be an American national (E. 175-180).

the United States" (E. 139-142; A. 127-128). A 1956 letter indicates that Mrs. Burns also stated that she was an American citizen in connection with the distribution of her father's French estate after his death (E. 189).

In 1958 she bought a yacht in the United States, intended for use in France, upon which she wished to fly the American Flag (E. 181).* She was entitled to do so as an American citizen who was registered with the American Consulate in Nice. (E. 182). Additionally, on a United States Coast Guard license application registering the yacht as American she "certified" that she was a citizen of the "U.S.A." (E. 184). The license which issued indicated that she was a United States citizen (E. 185-186).

In fact, Matheson wrote to the manufacturer of the yacht that "Mrs. Gould, a U.S. citizen, wishes to buy" it (E. 180). Matheson observed in a letter to the company which insured the shipment of the boat to France, typically not missing any details which might be of benefit to his client, as follows:

> "I am not sure but I believe the boat will go into France duty free inasmuch as Mrs. Gould is an American citizen and that boat will be registered in her name in care of me." (E. 188).

In purchasing land in France in 1957 and 1962, Mrs. Burns held herself out as an American citizen (E. 97, 189-192). At least from 1954 she was continuously regis-

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* Although not verified it is believed that she requested and received from the United States Consulate at Nice, the following affidavit:

> "The Services of the United States Consulate at Nice certify that Mrs. Dorothy Gould-Burns, holder of Passport of the U.S. . . . is authorized to fly the American Flag" (E. 181).

tered as an American national with the French National Sureté at Antibes as indicated by the identity card which they issued (E. 189-183).

Even after she died, Matheson still regarded Mrs. Burns as having been an American citizen. Thus, he reported her death to the American Consulate at Nice, France on July 19, 1969 on a form entitled "Report of the Death of an American Citizen" and had her American passport cancelled (E. 194-195). On August 12, 1969, pursuant to French law, an "Act of Notoriety" was caused to be signed and filed stating that Mrs. Burns was a citizen of the United States (E. 196-198).

Today, in order to save estate taxes, Matheson now wants to turn back history. He now says that the formal "adjudication" by the State Department that she was a U.S. citizen, which Matheson described as "favorable" and with which Mrs. Burns was "pleased", was wrong and must be overturned.

ARGUMENT

POINT I

Mrs. Burns did not intend to expatriate in 1944.

The appellant contends that when Mrs. Burns signed the application for a certificate of Mexican nationality she performed an act of expatriation as set forth in sections 401(a) and (b) of the Nationality Act of 1940.*

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* The statute provides in pertinent part as follows:

"Sec. 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

(a) Obtaining naturalization in a foreign state, . . . upon his own application . . .

* * * * *

(b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state . . ."

Regardless of the express language of that statute the Supreme Court has held that pursuant to the Fourteenth Amendment, American citizenship is a constitutional right of native-born Americans. Therefore Congress cannot automatically expatriate a native born citizen of the United States. *Afroyim* v. *Rusk*, 387 U.S. 253 (1967). *Afroyim* permits expatriation only upon "voluntary relinquishment" of U.S. citizenship by that citizen. Thus a native-born citizen cannot be "held to have lost his American citizenship regardless of his intention not to give it up." *Id.* at 255.*

The cases after *Afroyim* have required proof of "specific subjective intent to . . . renounce . . . United States Citizenship" before any person is found to be expatriated as a result of taking an oath of allegiance to another sovereign. See *King* v. *Rogers*, 463 F.2d 1188, 1189 (9th Cir. 1972); *Jolley* v. *INS*, 441 F.2d 1245, 1249-50 n. 9 (5th Cir. 1971); *Baker* v. *Rusk*, 296 F. Supp. 1244, 1246 (C.D. Calif. 1969).

The Supreme Court has further observed that "[t]he mere fact that . . . [a dual national] asserts the rights of one citizenship does not *without more* mean that he renounces the other." *Kawakita* v. *United States*, 343 U.S. 717, 724 (1952) (emphasis added). In cases of dual citizenship such as Mrs. Burns', the courts have refused to expatriate an American citizen who performs "routine acts" in the country of her other nationality when such acts merely show allegiance to that nation while she is there, but are not in fact in derogation of

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* Appellant cites *Rogers* v. *Bellei*, 401 U.S. 815 (1971) as perhaps overruling *Afroyim*. However, *Bellei* specifically distinguished *Afroyim* (p. 838) on the ground that *Afroyim* involved Fourteenth Amendment citizenship while *Bellei* involved a Congressional grant of citizenship that could be subject to a condition subsequent imposed by Congress which could strip that citizenship.

Since Mrs. Burns was a native-born Fourteenth Amendment citizen, *Bellei* is inapposite.

United States citizenship. Under such circumstances, the courts hold expatriative intent lacking.

In *Peter* v. *Secretary of State*, 347 F. Supp. 1035 (D.D.C. 1972) a three-judge court refused to expatriate an American woman who married a Hungarian and thereby as a matter of law became a citizen of Hungary. The *Peter* court stated:

> "[I]t is . . . clear that there can be no expatriation unless there is a voluntary act by which the American citizen unequivocally indicates relinquishment of American nationality in favor of allegiance to some foreign state. *Nishikawa* v. *Dulles*, 356 U.S. 129, 135 . . . . (1958); *Trop* v. *Dulles*, 356 U.S. 86, 92 . . . (1958)." 347 F. Supp. at 1038.

As a matter of convenience Mrs. Peter obtained and used a required Hungarian passport. The Court in *Peter* stated that "[a]ll this evidence was, at best, equivocal" because she was a dual national. *Id.* at 1039.

In dual citizenship cases even before *Afroyim* the courts restricted the concept of expatriating acts to those "where the nature and circumstances . . . have been such as to indicate some flouting of obligations inherent in American citizenship, if not an implied renunciation of the tie." *Jalbuena* v. *Dulles*, 254 F.2d 379, 381 (3d Cir. 1958). (No loss of citizenship in a case involving using two passports to travel, taking an oath to "support and defend" the Philippine constitution, and declaring allegiance to Philippine law, all of which was required before obtaining a passport). The test of loss of citizenship by a dual national is whether the person has placed himself in a position which makes it "impossible for him to perform the obligation of citizenship to this country." *Id.* at 381-82 n. 2. See also, *Note*, "Voluntary Relinquishment of American Citizenship: a Proposed Definition", 53 *Cornell L. Rev.* 324, 333 (1968).

Before *Afroyim*, Judge Kaufman, dissenting in *Tanaka* v. *INS*, 346 F.2d 438, 448 (2d Cir. 1965), quoted from *Jalbuena*. He was of the opinion that "expatriation statutes have limited application to dual nationals." See also, *In re Bautista's Petition*, 183 F. Supp. 271, 274 (D. Guam 1960); *Fletes-Mora* v. *Rogers*, 160 F. Supp. 215, 218 (S.D. Calif. 1958).

Matheson's new assertion that Mrs. Burns in fact was "naturalized" in 1944, is the only basis upon which he attempts to distinguish the *Peter*, *Jalbuena* and *Kawakita* line of dual nationality cases (Brief, p. 22).* He argues that Mrs. Burns was unequivocally expatriated under § 401(a) of the 1940 U.S. Nationality Act. However, the District Court held that Matheson's claim that Dorothy Gould Burns underwent "naturalization" under Mexican law was a semantic argument without foundation. We have shown (pp. 8-21, *supra*) that the District Court was correct in so holding and that Mrs. Burns was a Mexican national as a matter of law before she applied for a certificate in 1944. Thus, she did not obtain naturalization in a foreign state "*upon* . . . [her] *own application*." Section 401(a) is just not applicable.**

Moreover, unless Mrs. Burns was lying to the State Department when she said that she became a Mexican automatically upon her marriage, she always thought of herself as a dual national. Thus, regardless of the objective truth concerning antiquated Mexican law, Mrs. Burns could not have formulated the subjective intent to expatriate which is constitutionally required by *Afroyim* and the cases which follow it. Judge Duffy properly so held.

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* Matheson argues that none of the dual nationality cases "involved instances where the oath of allegiance was contained in an application for foreign citizenship." *Id.* The simple fact is that Mrs. Burns' 1944 application was *not* to obtain naturalization.

** If subsection (a) of the 1940 Act is inapplicable to the facts here, there is no constitutional question for the Court to reach as the appellant urges.

Similarly, the "protest of adhesion" (declaration of allegiance) cannot be considered meaningful under the dual nationality cases previously cited even though Mrs. Burns exercised her rights as a Mexican citizen by obtaining a Mexican passport. These were "routine" acts merely declaratory of one aspect of her dual status which were convenient for residence in Mexico. These acts "cannot reasonably have significance in derogation or renunciation of birthright American citizenship." *Jalbuena, supra* at 381.

As for the statement by Dorothy Gould Burns that as against the government of Mexico she would not "invoke . . . any right inherent in my nationality of origin" and that she renounces "all protection foreign to" the laws of Mexico and "any right which treaties or international law grant to foreigners", it was recognized by Rios to be a "compromise" renunciation which was ineffective in avoiding dual nationality. We submit that it could not have meant anything more to Mrs. Burns than it did to Rios. Judge Duffy recognized this when he held that the language of the "renunciations" could only be misinterpreted as an express renunciation of U. S. citizenship.

This compromise renunciation in fact does no more than restate a pre-existing understanding under international law that one country will not protect dual nationals while they are in the other country of which they are also a national. *Kawakita* v. *United States, supra* at 733; see *Nishikawa* v. *Dulles*, 356 U.S. 129, 132.

As found by the District Court, Mrs. Burns' reasons for obtaining a Mexican certificate of nationality were merely for her convenience. As such they are in no way evidence of an intent to expatriate. To the contrary, she always took actions consistent with Mr. Matheson's instructions to avoid expatriation. We have dealt

at great length with Mrs. Burn's actions regarding her American citizenship. We submit that they demonstrate overwhelmingly that she was a dual national who always intended to maintain her American citizenship.* Appellant has totally failed to demonstrate how Mrs. Burns, in the words of *Afroyim* "voluntarily relinquishe[d] [her] citizenship." 387 U.S. at 268.

The burden of proving expatriation is first a heavy one and secondly, one which falls upon the person who affirmatively alleges it. *Lehmann* v. *Acheson*, 206 F.2d 592, 598 (3d Cir. 1953); *Bauer* v. *Clark*, 161 F.2d 397 (7th Cir. 1947), *cert. denied*, 332 U.S. 839, *rehearing denied*, 332 U.S. 849 (1948). Mr. Matheson cannot prove with "clear, convincing and unequivocal evidence" that Mrs. Burns intended to expatriate.** *Dulles* v. *Katamoto*, 256 F.2d 545, 546 (9th Cir. 1958), *citing Nishikawa* v. *Dulles*, 356 U.S. 129, 133 (1958) The

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* There is no doubt (as the District Court held) that Mrs. Burns' acts after 1944 are relevant in determining her intent to expatriate. See *Kawakita* v. *United States*, *supra* (where a single later passport application at a consulate was considered so probative as to be controlling beyond a reasonable doubt). See the post-*Afroyim* agreement between the State Department, Justice Department and INS:

> "When the person is dead . . ., every effort should be made to develop evidence on the circumstances [surrounding a statutory act of expatriation] from any available source" (E. 214).

See also Note, 66 *Harv. L. Rev.* 643, 732 (1953).

** Section 1481(c) of 8 U.S.C. provides that expatriation must be proved by the party asserting it "by a preponderance of the evidence." However, given the difficulty of proving the constitutionally required subjective expatriative intent as well as the requirement of resolving ambiguities against the party alleging expatriation, we believe that the burden remains a "heavy" one which is most difficult to satisfy. Compare *Peter* v. *Secretary of State*, 347 F. Supp. 1035, 1038 (three judge court—D.D.C. 1972) (dual nationality case requiring "clear, convincing and unequivocal

[Footnote continued on following page]

Supreme Court has said that where loss of American citizenship is concerned, the courts will always construe both the law and the facts "as far as is reasonably possible in favor of . . . [citizenship]." *Schneiderman* v. *United States*, 320 U.S. 118, 122 (1943). This was echoed by Judge Kaufman in his pre-*Afroyim* dissent in *Tanaka* v. *INS*, *supra*, 346 F.2d at 446. See also the Attorney General's post-*Afroyim*, "Statement of Interpretation Concerning Expatriation of United States Citizens":

> Once the issue of intent is raised the act makes clear that the burden of proof is on the party asserting that expatriation has occurred. . . . 8 U.S.C. § 1481(c). *Afroyim* suggests that this burden is not easily carried. . . ." 42 Op. Atty Gen., No. 34, p. 4 (1964).

To the extent that Mexican law is today found to be ambiguous, any such ambiguity must be resolved in favor of an interpretation that would support a retention of United States citizenship. *Cf. Perkins* v. *Elg*, 307 U.S. 325, 337 (1939), *cited in*, *Nishikawa* v. *Dulles*, *supra* at 136 (ambiguity in a treaty).*

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evidence . . . of an intent to forfeit . . . American citizenship") with *King* v. *Rogers*, 463 F.2d 1188, 1189 (9th Cir. 1972) ("by a preponderance of the evidence").

It should be noted that § 1481(c) was not present in the 1940 Nationality Act. It was added in 1961 (Pub. L. 87-301). Matheson's reliance upon *King* would appear to be inappropriate concerning the burden of proving Mrs. Burns' expatriation in 1944 under the 1940 Act.

* In the instant action for a refund of gift taxes (74 Civ. 2437) the tax assessment itself is *prima facie* that Mrs. Burns was an American citizen. See *United States* v. *Lease*, 346 F.2d 696, 699 (2d Cir. 1965); *United States* v. *Mauro*, 243 F. Supp. 413, 415 (S.D.N.Y. 1965).

[Footnote continued on following page]

Matheson for the first time on appeal takes the position that the Court must hold section 401(b) of the 1940 Nationality Act (which is the same as the present 8 U.S.C. § 1481(a)(2)) unconstitutional before finding that Mrs. Burns was not expatriated by the declaration of allegiance contained in the 1944 application. While we think it can be persuasively argued that the entire statute was already held unconstitutional by *Afroyim*, and the government has proceeded on this basis, the specific question need not be reached for three reasons. First, as we have shown, the courts in dual citizenship cases always interpreted (even before *Afroyim*) that section to require an intent to expatriate which must be proved by clear and convincing evidence before the declaration of allegiance can be considered in derogation of allegiance to the United States. Second, if § 1481(a)(2) is interpreted to require an intent to expatriate there is no "constitutional" question which is raised. *Ashwander* v. *TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J. concurring). Third, since Mrs. Burns benefited from the government's application of that section as to her, her estate is estopped from raising the so-called constitutional question. *Id.*, citing *Great Falls Mfg. Co.* v. *Attorney General*, 124 U.S. 581 (1888).*

In his brief (pp. 16, 24, 25, 27, 36) herein, Matheson has cited the pre-*Afroyim* case of *Savorgnan* v. *United States*, 338 U.S. 491 (1950). That case is clearly distinguishable from Mrs. Burns' case. In *Savorgnan*, the renunciation by an American woman engaged to an Italian

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There is also no question that Matheson bears the burden of proof on all issues in the Tax Court proceeding. See Rule 142, Rules of Practice and Procedure, United States Tax Court; *Welsh* v. *Helvering*, 290 U.S. 111, 115 (1933).

However, if it wasn't for the requirement that the party alleging expatriation always bears the burden of proving expatriation the burden would be on the government in the erroneous refund action. *Soltermann* v. *United States*, 272 F.2d 387 (9th Cir. 1959).

*** See also Points II and III, *infra*.**

man unequivocally stated: "I renounce and in truth do renounce my American citizenship . . . " The unequivocal renunciation was required by Italian law as a pre-condition to both naturalization and marriage by a foreign woman to an Italian man. The renunciation was translated into English for the American woman by her Italian husband-to-be. The objective evidence therefore clearly showed Mrs. Savorgnan's subjective intent to expatriate.

Matheson also argues that Mrs. Burns visited this country only once a year and did not live here at all since she was 15 years old. The Supreme Court has stated that living abroad for long periods of time is not indicative of lack of allegiance. See *Schneider* v. *Rusk*, 377 U.S. 163, 169 (1964).

POINT II

Matheson is barred by the doctrines of administrative collateral estoppel and equitable estoppel from taking the position that Mrs. Burns was not a citizen of the United States.

As an alternative holding the District Court found that Matheson was estopped from taking the position that Mrs. Burns was not a citizen of the United States. It held that Matheson could not disown Mrs. Burns' and his own previous contention since she received passports and a license from the United States government on the strength of that contention (A. 40-42). We believe that the flexible concept of administrative collateral estoppel * and equitable estoppel are interwoven. Thus, we will treat them together.

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* See *Cartier* v. *Secretary of State*, 506 F.2d 191, 196 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 947 (1975).

The Passport Office of the Department of State was and is charged by statute with making "the determination of nationality of a person not in the United States." 8 U.S.C. § 1104. It is one of the agencies of the United States Government which has the undoubted right of every sovereign to determine who are its nationals. See Briggs, The Law of Nations, pp. 458-60 (2d ed. 1952). Those who come before the Passport Office in citizenship determinations have the right to be represented by counsel and to submit evidence and legal argument in support of their position that they are citizens of the United States. They have the right to have the District Court review an adverse decision.

We have previously discussed at length the steps taken by Mrs. Burns and Mr. Matheson which resulted in a favorable determination by the State Department that Mrs. Burns had not been expatriated by obtaining a certificate of Mexican nationality. *Supra*, pp. 31-37. After this determination passports were continuously issued to Mrs. Burns for the rest of her life. On the strength of these passports Mrs. Burns freely entered and stayed in this country without restrictions applicable to aliens.

The Coast Guard also issued a license which permitted her to register her yacht as an American flag vessel. She sought the aid of the American government when she had difficulty with the airlines in Mexico in 1953; thereafter she was registered as an American citizen with the American Mission in France and was able to look to them for aid if the need should have arisen.

With chameleonic skill and 3.5 million dollars hanging in the balance, Mr. Matheson today seeks to undo that favorable determination by the State Department. The law of collateral and equitable estoppel is not so generous with such duplicity.

If these agencies knew that Mrs. Burns or her estate would take a position years later that she was not a U.S. citizen and thus not entitled to such passports, licenses and aid, they "might conceivably have refused . . . [their] . . . approval." *Callanan Road Improvement Co.* v. *United States*, 345 U.S. 507, 513 (1953) (involving the issuance by the ICC of an operating permit to the appellant's predecessor in interest). The *Callanan* court further stated:

> "The appellant cannot blow hot and cold and take now a position contrary to that taken in the proceedings it invoked to obtain the Commission's approval. . . ." *Id.*

See *Roth* v. *McAllister Bros., Inc.*, 316 F.2d 143 (2d Cir. 1963) (defendant estopped from asserting in Federal District Court inconsistent claim after successfully taking a contrary position before a state administrative body).*

The principles of equitable estoppel are applicable to citizenship determinations. *Simons* v. *United States*, 333 F. Supp. 855 (S.D.N.Y.), *aff'd on other grounds, including laches*, 452 F.2d 1110 (2d Cir. 1971) (wife's claim of fraud after the death of her ex-husband was prompted by the wife's desire to apply foreign law in order to share in the proceeds of her ex-husband's estate.) The court held:

> "Even if plaintiff originally secured her citizenship under duress, she has since then voluntarily enjoyed the fruits of her citizenship for some 23

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* See also *Davis* v. *Wakelee*, 156 U.S. 680, 689 (1895); *Eads Hide & Wool Co.* v. *Merrill*, 252 F.2d 80, 84 (10th Cir. 1958) (creditor's inconsistent positions in two bankruptcy proceedings); *Jamison* v. *Garrett*, 205 F.2d 15, 17 (D.C. Cir. 1953) (inconsistent positions by an executrix as to testatrix's ownership of property); *Hart* v. *Mutual Ben. Life Ins. Co.*, 166 F.2d 891, 894 (2d Cir.), *cert. denied*, 335 U.S. 826 (1948) (inconsistent positions as to jurisdiction of New York Surrogate's Court).

> years. She has availed herself of United States Consular services abroad, has entered New York State courts, presumably has traveled with an American passport, and admits that she paid New York and federal income taxes for the purpose of avoiding higher Dutch taxes. She may well have lacked intention to reside in the United States permanently and may well have secured her citizenship by fraud. However, insofar as she seeks a personal benefit by taking advantage of her own fraud and seeking to reject her citizenship at this time, we hold that she is estopped from doing so." *Id.*, 333 F. Supp. at 867.

See also, *Rosasco* v. *Brownell*, 163 F. Supp. 45 (E.D.N.Y. 1958) (plaintiffs were estopped from seeking adjudication of their citizenship after they gained entry to the United States by asserting that they were Italian citizens and required only temporary visas); *Benitez Rexach* v. *United States*, 390 F.2d 631 (1st Cir.), *cert. denied*, 393 U.S. 833 (1968), (plaintiff who convinced the Department of State that his previous unequivocal formal renunciation of American citizenship was involuntary, conceded in a tax case "*that as a matter of law he is precluded from claiming that he ever ceased to be a United States citizen.*")*

Not only must it be remembered that Mrs. Burns benefited by the government's issuance of U.S. passports and a license, but that she also financially benefited from her retention of U.S. citizenship. Thus, she was able to convince the French authorities that her U.S. "tax free" income was not taxable in France because she was a U.S. citizen. She also apparently gained access to New York's Surrogate's Court proceedings after her mother's death. *Simons*, *supra*, 333 F. Supp. at 867.

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* U.S. taxes are the cost of citizenship and permit the government "to make citizenship completely beneficial" especially with respect to those citizens living abroad. *United States* v. *Bennett*, 232 U.S. 299, 307 (1914); *accord*, *Cook* v. *Tait*, 265 U.S. 47, 56 (1924).

This receipt of benefits is especially significant in tax cases. Thus, in *Kurz* v. *United States*, 156 F. Supp. 99, 106 (S.D.N.Y. 1957), *aff'd*, 254 F.2d 811 (2d Cir. 1958), the court held that since decedent procured advantages by taking one position during his lifetime his executor could not avoid the Federal tax consequences of that position by later taking an inconsistent position. The court held the executor estopped. See *Commissioner* v. *National Alfalfa*, 417 U.S. 134, 149 (1974);* *Cities Service* v. *United States*, Docket Nos. 74-1221, 74-1490 (2d Cir., December 13, 1974), *cert. denied*, 44 U.S.L.W. 3201 (October 7, 1975); *Cummings* v. *Commissioner*, 506 F.2d 449, 451 (2d Cir. 1974), *cert. denied*, 421 U.S. 918 (1975).**

Mr. Matheson apparently relies upon language in *Helvering* v. *Schine Chain Theatres, Inc.*, 121 F.2d 948 (2d Cir. 1941) to avoid the notion that he is estopped from raising the question of Mrs. Burns' citizenship. That case did not involve any issue of citizenship status or acceptance of governmental benefits and licenses. *Schine* stands only for the proposition that the Commissioner of Internal Revenue, in a non-citizenship case, cannot assert estoppel against the taxpayer "founded

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* "This Court has observed repeatedly that, while a taxpayer is free to organize his affairs as he chooses, nevertheless, once having done so, he must accept the tax consequences of his choice, whether contemplated or not, *Higgins* v. *Smith*, 308 U.S. 473, 477 (1940); *Old Mission Portland Cement Co.* v. *Helvering*, 293 U.S. 289, 293 (1934); *Gregory* v. *Helvering*, 293 U.S. 465, 469 (1935), and may not enjoy the benefit of some other route he might have chosen to follow but did not." *Commissioner* v. *National Alfalfa*, *supra* at 149.

** In other contexts persons accepting governmental benefits on the strength of a particular position have been estopped from later disavowing that position. See *Weir* v. *United States*, 474 F.2d 617, 622 (Ct. Cl.), *cert. denied*, 414 U.S. 1066 (1973); *United States* v. *Kausen*, 208 F. Supp. 858, 861 (S.D. Calif. 1962).

upon silence due to an error of [illegible]." See *Countway* v. *Commissioner*, 127 F.2d 69, 76 ([illegible] Cir. 1942) (Magruder, J.). In the instant case Mrs. Burns was hardly silent about her citizenship. Even a wrong determination of citizenship would not be limited to an "error of law" as that term was used in *Schine*. A citizenship determination involves not merely questions of law but largely questions of fact concerning intent to expatriate as well as the quasi-factual question of Mexican law.

In order to avoid estoppel Matheson's brief acknowledges (p. 33), any such error of law must be innocent. He contends that she made an innocent error in continuously stating that she was a U.S. citizen. However, in Point I of his brief Matheson argues that Mrs. Burns' intent to expatriate was clear and unambigous. These positions are impossible to reconcile. Matheson himself implied that Mrs. Burns misrepresented her citizenship in order to obtain more convenient travel arrangements. Additionally Matheson himself testified at his deposition that as far back as 1953 he did not think that Mrs. Burns was in fact a U.S. citizen. Under these circumstances the alleged error can hardly be called innocent.

POINT III

Matheson is barred by the doctrine of laches from taking the position that Mrs. Burns was not a citizen of the United States.

Judge Friendly, in affirming the District Court's decision in *Simons* v. *United States*, 452 F.2d 1110, 1116-17 (2d Cir. 1971) stated as follows:

> "If we entertained a different view on the points so far discussed, we would nevertheless affirm the order of dismissal and denial, on the

> ground of laches. Both the complaint and the motions turn on John Simons' intention to reside in the United States when he and his wife petitioned for naturalization and on the nature of his employment . . . 22 years before these proceedings were brought. His testimony would have been of the utmost importance, on an issue on which both he and the United States would have had an important interest. If the facts were as Mrs. Simons now represents, they must have been known to her long ago. The papers reveal no reason for the inordinate and prejudicial delay. Cf. *Sciria* v. *United States*, 238 F.2d 77 (6th Cir. 1956). Apparently Mrs. Simons was quite content with the situation until the divorce in 1964; even then she did nothing until her husband's death in 1968 opened new vistas at a time when contradiction by him was no longer possible."

See also, *Commissioner* v. *National Lead Co.*, 230 F.2d 161, 165 (2d Cir. 1956), *aff'd without reaching the issue*, 352 U.S. 313 (1957).

The government should not be required today to relitigate the status of a woman who was content with her United States citizenship during her lifetime, who in fact received a formal adjudication that she was a United States citizen and who received substantial benefits therefrom. Neither she nor her estate can have any excuse for the inordinate delay in taking the present position.

POINT IV

Summary judgment was properly granted.

Matheson argues that since a major issue is intent to expatriate, summary judgment was improper. This argument silently acknowledges that the questions of

estoppel and laches were appropriate for summary judgment. Cf. *Lowell* v. *Twin Disc, Inc.*, Dkt. No. 75-7259 (2d Cir. Nov. 18, 1975).

Rule 56, Fed. R. Civ. P. was designed to avoid purposeless trials as well as "fruitless" reversals and remands. See *Beal* v. *Lindsey*, 468 F.2d 287, 292 (2d Cir. 1972). Cf. *Radio City Music Hall Corp.* v. *United States*, 135 F.2d 715 (2d Cir. 1943). This case presents a most unique combination of circumstances. We have a totally paper record after completion of extensive discovery. The Liguoris' depositions were taken in Mexico. They are not subject to the Court's jurisdiction. Their live testimony was never intended to be offered. Matheson met Mrs. Burns in 1952. Except for the purpose of making admissions, his testimony as to Mrs. Burns' intent in 1944 is self-serving hearsay. This is the only "non-documentary" testimony available on the subject of Mrs. Burns' intent. Both parties have waived a jury so that any "trial" would be to the Court on precisely the same evidence submitted on the motions for summary judgment. "No further light can be thrown upon . . . [Mrs. Burns' intent], and we should be in precisely the same position after a trial as at present." *Houghton Mifflin Co.* v. *Stackpole Sons, Inc.*, 113 F.2d 627 (2d Cir. 1940).* Under these unusual circumstances the granting of summary judgment was appropriate. There is simply nothing left to do but decide the case.

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* The instant adjudication was not a trial by affidavit or one where helpful demeanor testimony is available. Nor is it a case where ambiguities should automatically be resolved against the party requesting summary judgment. *Compare, Heyman* v. *Commerce & Ind. Ins. Co.*, Docket No. 75-7230 (2d Cir., October 24, 1975); *Judge* v. *City of Buffalo*, Docket No. 75-7314 (2d Cir., October 24, 1975). In this expatriation case (where both parties moved for summary judgment) as a substantive matter, all evidentiary anl legal ambiguities must be resolved against the party alleging expatriation. See pp. 46-47, *supra*.

CONCLUSION

The judgment of the District Court should be affirmed.

Dated: New York, New York
November, 1975

Respectfully submitted,

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State of New York)
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That on the 3rd day of December 1975 s he served 2 copies of the within

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Sworn to before me this

3rd day of December 1975

Lawrence Mason

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